United States Court of Appeals

for the Second Circuit



APPELLANT'S REPLY BRIEF

76-7357

In The

United States Court of Appeals

For The Second Circuit

HERZOG & STRAUS, a partnership organized under the laws of the State of New York,

Plaintiff-Appellant,

-against-

GRT CORPORATION,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal No. 76-7357

HERZOG & STRAUS, a partnership organized under the laws of the State of New York,

Plaintiff-Appellant,

-against-

GRT CORPORATION,

Defendant-Appellee.

REPLY BRIEF FOR APPELLANT

Preliminary Statement

Plaintiff-appellant Herzog & Straus ("plaintiff-appellant") submits this reply brief in support of its appeal from the entry of summary judgment against it sua sponte without any motion for summary judgment pending before the Court, without an evidentiary hearing on genuine issues of material fact, in complete disregard of Rule 56 F.R.C.P., and based upon the erroneous premises that the complaint is based upon prima facie tort and not upon tortious interference with contract or business relations. Not only does defendant-appellee's brief

fail to provide any support for the propriety of the district court's entry of summary judgment sua sponte during a hearing on plaintiff-appellant's application for a preliminary injunction, but defendant-appellee's assertion that plaintiff-appellant had adequate opportunity to demonstrate the existence of disputed issues of material fact in the context of a preliminary injunction hearing is factually incorrect and has been rejected in a similar case (see p. 3, infra.) Furthermore, far from demonstrating that plaintiff-appellant's action is barred as a matter of law, defendant-appellee's brief further supports plaintiff-appellant's assertion that there are numerous, substantial disputes with respect to material issues of fact which preclude the entry of summary judgment against plaintiff-appellant.

Defendant-Appellee Has Failed To Cite A Single Case Involving Circumstances Even Remotely Similar To Those Here In Which The District Court Entered Summary Judgment Without Notice Sua Sponte

Defendant-appellee asserts that plaintiff-appellant had ample opportunity to demonstrate the existence of a genuine dispute with respect to material facts in the context of its application for a preliminary injunction (Brief, p. 14). This very same argument, however, was rejected in

Georgia, Southern & Florida Railway Co. v. Atlantic Coast Line Railroad Co., 373 F.2d 493 (5th Cir.), cert. denied, 389 U.S. 851 (1967). There, the Fifth Circuit rejected the argument that a hearing on a preliminary injunction afforded plaintiff ample opportunity to demonstrate that there is a dispute with respect to material issues of fact sufficient to preclude summary judgment. The court compared the potentially terminal nature of a motion for summary judgment with the limited nature of a motion for a preliminary injunction and concluded that in litigating the latter a plaintiff would not necessarily present every factual and legal argument available:

> "ACL's argument that the hearing on preliminary injunction effectively presented all of the issues which GS&F could or would have presented at a hearing on summary judgment is inapposite, for loss of a motion for preliminary injunction means only temporary lethality. Final judgment is not then a possibility. When such a limited adjudication is the order of the day, we cannot say with assurance that the parties will present everything they have. The very intimation of mortality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available." 373 F.2d at 497-498.

See Peden v. U.S. Civil Service Comm., 54 F.R.D. 389 (S.D.N.Y. 1971).

Here, of course, plaintiff-appellant was taken completely by surprise especially since, in this Circuit, it is sufficient to show serious questions and irreparable injury to sustain a motion for a preliminary injunction.

It was not necessary for plaintiff-appellant to demonstrate ultimate success on all of its theories on a motion for a preliminary injunction.

Defendant-appellee's brief does not contain a single authority supporting the District Court's disposal of this case. On the contrary, defendant-appellee's brief only contains authority for the proposition that a court may enter summary judgment for an adverse party where there is a motion for summary judgment before the court by the other party. The only case cited by defendant-appellee in which there was no formal motion for summary judgment before the court arose in the Tenth Circuit in a context where the parties had the opportunity to present their proof.

In United States v. Fisher-Otis Company, Inc., 496 F.2d 1146 (10th Cir. 1974), a declaratory judgment action, the parties agreed at a pre-trial conference that the court would determine their respective rights under the easement in question prior to any further proceedings in the case. After the parties had submitted briefs to the court, the court entered summary judgment for the plaintiff. The Tenth Circuit affirmed the granting of summary judgment based upon its determination that defendants had conceded that there were no essential facts in dispute by joining in the submission of the ultimate legal issues to the court:

> "We point out, once again, that the parties agreed at the pretrial conference to submit the legal issues ultimately in dispute to the District Court for final determination. They

> filed briefs in support of their arguments. By joining in the submission of the [illegible] legal issues herein involved to the [illegible] Court for resolution, defendants as[illegible] conceded that, as to the resolution of those legal issues, there were no essential facts in dispute." 496 F.2d at 1151-1152.

Contrary to the situation in Fisher-Otis, plaintiff-appellant here was given no notice whatsoever that the court would attempt to dispose of the ultimate issues in the case at the hearing on the preliminary injunction, and was not given the opportunity to support all of its contentions by appropriate memoranda and evidence. Furthermore, plaintiff-appellant never has conceded that there are no material issues of fact in dispute and strenuously urges the contrary.

In the other Tenth Circuit case cited by defendant-appellee, Wirtz v. Young Electric Sign Company, 315 F.2d 326 (10th Cir. 1963), the Court did not reach the propriety of the district court's sua sponte summary dismissal of the action; instead it reversed the summary disposal of the action because it could not determine the basis for the district court's action.

Indeed, appellee's contentions are contrary to the Tenth Circuit's later decision in Adams v. Campbell County School District, 483 F.2d 1351 (10th Cir. 1973), in which the Court required strict compliance with Rule 56's notice provisions (483 F.2d at 1353):

"The summary judgments cannot stand. Rule 56(c), F.R.Civ.P., provides that a motion for summary judgment shall be served at least 10 days before the hearing date and before that date the adverse party may serve opposing affidavits. Noncompliance with the time provision of the rule deprives the court of authority to grant summary judgment."

Thus, defendant-appellee provides no support for the District Court's summary disposal of this action.

Where no party has moved for summary judgment there is a likelihood that "the parties will not have a full and fair opportunity to meet the proposition that there is no genuine issue of material fact." 6 Moore's Federal Practice, ¶56.12, p. 56-339. As a result, strict compliance with the provisions of Rule 56 should be required. See, Twin City Federal Savings & Loan Association v. Transamerica Insurance Company, 491 F.2d 1122 (8th Cir. 1974)(Eighth Circuit requires strict compliance with the provisions of Rule 56); Bowdidge v. Lehman, 252 F.2d 366 (6th Cir. 1958)(Rule 56 requires some notice and hearing when court contemplated sua sponte dismissal); Adams v. Campbell County School District, 483 F.2d 1351 (10th Cir. 1973)(non-compliance with notice provisions of Rule 56 deprives the court of authority to grant summary judgment).

The procedural history of this case clearly demonstrates that plaintiff-appellant was deprived of a

full and fair opportunity to meet the proposition that there are no genuine issues of material fact by virtue of the District Court's entry of summary judgment sua sponte during the hearing on plaintiff-appellant's motion for a preliminary injunction. The action of the Court below was an abuse of discretion which should be remedied by reversing the entry of summary judgment and allowing plaintiff-appellant a full and fair opportunity to prove the genuine issues of material fact which remain to be resolved.

Defendant-Appellee's Brief (a) Clearly Supports Plaintiff-Appellant's Assertion That There Are Unresolved Issues of Material Fact Which Preclude The Entry Of Summary Judgment And (b) Fails To Demonstrate That Summary Judgment Was Properly Entered

Defendant-appellee's brief raises sufficient additional unresolved disputes concerning material issues of fact to demonstrate that summary judgment should not have been entered. Before reaching the question of disputed material facts under New York law, a preliminary question awaiting resolution concerns whether or not California law applies in this case. Defendant-appellee, a California corporation, refused to allow plaintiff-

appellant to audit its books. Furthermore, the letter sent by defendant-appellee informing plaintiff-appellant of such refusal, is written on paper with a California letterhead and presumably was sent from California. Should California law apply, it may have a significant impact on the outcome of this litigation. Under California law it is clear that a person cannot intentionally interfere with a contract even if it is terminable at will. See, Freed v. Manchester Service Inc., 165 Cal. App.2d 186 (2d Dist. 1958) Furthermore, justification is an affirmative defense under California law. See, Augustine v. Trucco, 124 Cal. App.2d 299, 268 P.2d 780 (2d Dist. 1954) and Freed, supra. Clearly, the issue of the governing law was not resolved. Indeed, the precise nature of the contractual relationships between plaintiff-appellant and its clients raises yet further material issues of fact.

A. Interference With a Business Relationship

In response to the claim of interference, defendant-appellee alleges a mere "request" to third parties that they use auditors other than plaintiff-appellant and that such conduct was not unlawful. The record is clear, however, that defendant-appellee did

more than just "request" a change of auditors. In fact, as alleged, it refused to allow plaintiff-appellant access to the relevant files. (Complaint, ¶¶7, 19 and 32; 7-a, 9-a, 10-a; Herzog affidavit, ¶8 and Exhibit D annexed thereto, 20-a, 28-a.) Since plaintiff-appellant's clients had a legal right to specify plaintiff-appellant as their auditors, defendant-appellee's interference with plaintiff-appellant's performance of the audits pursuant to that legal right is actionable.* See Federal Waste Paper Corp. v. Garment Center Capitol, Inc., 57 N.Y.S.2d 200 (Sup. Ct. 1945).

Furthermore, the contention that defendant-appellee's conduct amounted to a mere "request" raises yet further triable issues.

B. Prima Facie Tort

There is a substantial dispute as to the reasons for defendant-appellee's interference with plaintiff-appellant's performance of its audits as requested by plaintiff-appellant's clients. Based upon plaintiff-appellant's conjecture that defendant-appellee may have

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*The Court below only concerned itself with justification as a defense to prima facie tort. There has been no factual development with respect to the true reasons behind defendant-appellee's conduct nor any determination whatsoever as to the sufficiency of a justification defense with respect to legal theories other than prima facie tort.

been motivated by a desire to prevent plaintiff-appellant from discovering unpaid royalties (Transcript, 44-a), the Court below surprisingly granted summary judgment sua sponte. The Court apparently reasoned that plaintiff-appellant, by "conceding that defendant has a selfish motive for its conduct. . . conclusively established that it has no cause of action in prima facie tort" (50-a). First, there was no "admission" by appellant and there could be none since appellant is not yet privy to appellee's motivations. Second, defendant-appellee, both before the Court below and in its reply brief, offered a different reason for its conduct by alluding to "grave concern" with plaintiff-appellant's audit practices and fear that plaintiff-appellant would damage its business relationships with others (Ware Aff., ¶¶ 11 and 12, 31-a and 35-a; Brief, p. 16). Thus, the Ware affidavit itself raises material questions. In view of plaintiff-appellant's lack of knowledge concerning defendant-appellee's motivations and defendant-appellee's statement that its motivations actually were different from those conjectured by plaintiff-appellant which were the basis for the lower court's granting of summary judgment under prima facie tort, it is clear that a dispute as to this material fact existed at the time summary judgment was entered. The purported justification which will allow defendant-appellee to escape prima facie tort must be one which the law will recognize. Obviously the Court is not in a position to

determine whether or not defendant-appellee's conduct was justified until the reasons for that conduct are enunciated. During the course of the hearing before the Court below defendant-appellee offered the "true" reasons for its conduct, but the Court refused to hear them (Transcript, 48-a). Obviously, defendant-appellee was not relying on an economic justification for its conduct but upon other matters which were not developed. Material questions of fact are present and have not been resolved.

C. Interference With Contractual Relationships

Contrary to defendant-appellee's incorrect argument (Brief, p. 10), plaintiff-appellant sought to urge below that the basis of its claim was interference with its contracts with its clients. Defendant-appellee's brief underscores the fact that there are unresolved disputes with respect to other material facts which will be relevant to plaintiff-appellant's claim for interference with contractual relationships.*

Defendant-appellee's brief clearly admits that

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*The record before the Court below clearly demonstrated that plaintiff-appellant had been retained by clients who were entitled by contract to specify any auditors to review defendant-appellee's books and records (Complaint, ¶¶4, 5, 16, 18, 28; 7-a, 8-a, 9-a, 10-a; Herzog affidavit and Exhibits thereto, 19-a, 20-a, 26-a; Ware affidavit, ¶3; 30-a). In the event plaintiff-appellants did not sufficiently plead the existence of contractual relations with such clients, leave to replead should have been granted.

there has been no determination made concerning the nature of plaintiff-appellant's relationships with its clients. In order to circumvent the fact that a dispute exists with respect to that material fact, defendant-appellee offers a bifurcated, conjectural argument, if plaintiff-appellant's contractual relationships with its clients are (a) terminable at will or (b) for a definite duration. These arguments, however, underscore the existence of additional unresolved disputes of material fact which preclude the granting of summary judgment.

(i) At-Will Contracts

Even under defendant-appellee's authorities concerning the defense of justification in interfering with "at-will" business relationships, a third party which is advancing its own economic interest does incur liability if "the means employed to accomplish the interference were dishonest or unfair." Despite the fact that the Court below did not even decide whether or not defendant-appellee had a sufficient and real economic justification and based upon the erroneous statement that plaintiff-appellant asserts that defendant-appellee was primarily motivated to protect its own economic and contractual interest, defendant-appellee asserts that it would be entitled to summary judgment

on a claim of interference with contractual relationships. Defendant-appellee does not discuss the fact that whether or not the means it employed were not dishonest and unfair was not even alluded to by the Court below, let alone demonstrate that there was no dispute with respect to that material fact. Furthermore, there is a very substantial question whether defendant-appellee's alleged economic interest is one recognized by the law as worthy of protection.

(ii) Contracts for a Definite Duration

Similarly, defendant-appellee's brief concerning interference with a contract of a definite duration also raises numerous unresolved issues of fact. The rule set out in §773 of the Restatement of Torts,* assumes that the person relying upon privilege to interfere with a contract is protecting properly "a legally protected interest of his own" which he believes will be impaired. There has been no determination of, and a dispute exists, with respect to material facts, concerning the nature of defendant-

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*Defendant-appellee's reliance on §769 of the Restatement of Torts is misplaced, as Comment d to that Section clearly states that the rule enunciated in the Section "does not apply to the causing of a breach of contract".

appellee's protected interest and whether or not it is entitled to protection.

In fact, the Comment and Illustrations to Section 773 clearly indicate that the rule stated there was not designed to cover the situation involved in this case. That Section enunciates a rule "of narrow scope" which protects a party "only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by proper means." The Illustrations for the rule raise factual questions, are entirely different from the facts in this case, and involve situations where one asserts or threatens to protect a contractual right to preclude another from receiving the fruits of one's contract and thus interfering with its performance. In this case, plaintiff-appellant is not attempting to usurp the benefits of defendant-appellee's contracts. Thus, defendant-appellee in blackballing plaintiff-appellant f[redacted]performing audits, is not protecting any "legally protected interest" within the meaning of the section. In fact, defendant-appellee is actually breaching its contracts with plaintiff-appellant's clients by wrongfully refusing access to their authorized auditors.

In addition, the type of purported interest

sought to be protected by defendant-appellee is far removed from those apparent legitimate interests involved in the cases cited in its brief. Unlike the cases cited, defendant-appellee is not interfering with plaintiff-appellant's contractual arrangements with its clients to preclude them from breaching their contracts with defendant-appellee. See In re Farrell Publishing and Knapp. Nor is defendant-appellee merely informing third parties of its legal rights under its contracts. See, Martin and Pierce Ford. On the contrary, plaintiff-appellant's clients have a right to specify plaintiff-appellant to conduct their audits and defendant-appellee has not asserted that it has a contractual right to bar the appointment of plaintiff-appellant. Clearly this is not a case where a shareholder is privileged to interfere with contracts made by his company or where a manufacturer is entitled to interfere with its distributor's distribution of its products. See, Felson, Morrison and Martin. The only other situation covered by the authorities cited by defendant-appellee involves an indemnitor's privilege to accept the lowest bid submitted. See Zoby.

The complaint and Herzog affidavit sufficiently allege torts of inducing breach of contract or interfering

with business relations, raise substantial and material questions of fact and the action should not have been dismissed summarily.

In view of all of the material factual questions presented, it is not surprising that Mr. Ware, an attorney, stated in his affidavit that the issues "will be determined at a trial" (Ware Aff., ¶7, 33-a).

CONCLUSION

For the reasons stated herein, the decision of the Court below should be reversed and the complaint reinstated. Alternatively, the case should be remanded with Herzog & Straus given the opportunity to replead.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No.

HERZOG & STRAUS,

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against

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Defendant-Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452.

That on the 11th *day of* **November** *19* **76** *at* **1370 Avenue of the Americas New York, N.Y.**

deponent served the annexed **Reply brief** *upon*

Arrow, Silverman & Parcher

the **attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 11th *day of* **November** *1976*

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E Thomas

Print name beneath signature

KEVIN E. THOMAS